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9 UNITED STATES DISTRICT COURT
10 WESTERN DISTRICT OF WASHINGTON
11 AT TACOMA

12 QUILLON EDWARD CLEMONS,
13 Petitioner,

14 v.

15 TACOMA MUNICIPAL COURT,
16 Respondent.

Case No. C11-5397BHS/JRC

ORDER TO FILE AN
AMENDED PETITION

17 The petitioner in this action is seeking habeas corpus relief from a state conviction. Thus,
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19 the petition is properly considered pursuant to 28 U.S.C. § 2254.

20 The petition has two defects. The first defect is the named respondent. Petitioner has
21 named the Tacoma Municipal Court as the respondent. A proper respondent is “the person
22 having custody of the person detained.” 28 U.S.C. § 2243. This person typically is the
23 superintendent of the facility in which the petitioner is incarcerated. Failure to name the
24 petitioner’s custodian deprives federal courts of personal jurisdiction. Stanley v. California
25 Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994).

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1 The second defect is that petitioner does not show he has exhausted his available state
2 remedies. A state prisoner seeking habeas corpus relief in federal court must exhaust available
3 state relief prior to filing a petition in federal court. As a threshold issue, this court must
4 determine whether or not petitioner has properly presented the federal habeas claims to the state
5 courts. 28 U.S.C. § 2254(b)(1) states, in pertinent part:
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7 (b)(1) An application for a writ of habeas corpus on behalf of a person in custody
8 pursuant to the judgment of a state court shall not be granted unless it appears
9 that:

- 10 (A) the applicant has exhausted the remedies available in the courts of the
11 state; or
12 (B) (i) there is an absence of available state corrective process; or
13 (ii) circumstances exist that render such process ineffective to protect the
14 rights of the applicant.

15 To exhaust state remedies, petitioner's claims must have been fairly presented to the
16 state's highest court. Picard v. Connor, 404 U.S. 270, 275 (1971); Middleton v. Cupp, 768 F.2d
17 1083, 1086 (9th Cir. 1985) (petitioner "fairly presented" the claim to the state Supreme Court
even though the state court did not reach the argument on the merits).

18 A federal habeas petitioner must provide the state courts with a fair opportunity to correct
19 alleged violations of federal rights. Duncan v. Henry, 513 U.S. 364, 365 (1995) (*citing Picard*,
20 404 U.S. at 275). Petitioner must have exhausted the claim at every level of appeal in the state
21 courts. Ortberg v. Moody, 961 F.2d 135, 138 (9th Cir. 1992). It is not enough that all the facts
22 necessary to support the federal claim were before the state courts or that a somewhat similar
23 state law claim was made. Duncan, 513 U.S. at 365-66 (*citing Picard*, 404 U.S. at 275 and
24 Anderson v. Harless, 459 U.S. 4 (1982)). The petitioner must present the claims to the state's
25 highest court, even if such review is discretionary. O'Sullivan v. Boerckel, 526 U.S. 838, 845
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1 (1999); Larche v. Simons, 53 F.3d 1068, 1071 (9th Cir. 1995). “An applicant shall not be
2 deemed to have exhausted the remedies available in the courts of the State, within the meaning
3 of this section, if he has the right under the law of the State to raise, by any available procedure,
4 the question presented.” 28 USCA § 2254(c).

Although respondent can waive the exhaustion defense, respondent must do so explicitly. 28 U.S.C. § 2254 (b)(3). Here, respondent has not explicitly waived the exhaustion defense.

8 Petitioner is directed to file an amended petition on the form provided by the court
9 curing, if possible, these two defects. The amended petition will act as a complete substitute for
10 the original. The amended petition will be due on or before **July 22, 2011**. Failure to comply
11 with this order will result in a Report and Recommendation that this action be dismissed

The Clerk is directed to mail a copy of this Order to petitioner and note the **July 22, 2011**, deadline on the court's calendar.

Dated this 13th day of June, 2011.

J. K. Ward (matins)

J. Richard Creatura
United States Magistrate Judge